

STATE OF NEW YORK
SUPREME COURT COUNTY OF CATTARAUGUS

ALLEGANY WIND LLC,

Plaintiff,

SUMMONS

-against-

Index No.:

80729

RJI No.:

THE TOWN OF ALLEGANY TOWN BOARD.

Defendant

To the above named Defendant:

YOU ARE HEREBY SUMMONED and required to serve upon plaintiff's attorney an answer to the complaint in this action within twenty (20) days after the service of this summons, exclusive of the day of service, or within thirty (30) days after service is complete if this summons is not personally delivered to you within the State of New York. In case of your failure to answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated: October 4, 2012

YOUNG/SOMMER LLC

By:



Douglas H. Ward, Esq.
Attorneys for Plaintiff
Allegany Wind LLC
Executive Woods
Five Palisades Drive
Albany, New York 12205
(518) 438-9907

Trial is desired in the County of Cattaraugus. The basis of venue designated above is that Defendant is located in the County of Cattaraugus and Cattaraugus County is the venue provided in the contract.

CATTARAUGUS COUNTY CLERK
2012 OCT -5 P 1:16

STATE OF NEW YORK
SUPREME COURT COUNTY OF CATTARAUGUS

ALLEGANY WIND LLC,

Plaintiff,

COMPLAINT

-against-

Index No.:

RJI No.:

80729

THE TOWN OF ALLEGANY TOWN BOARD.

Defendant

Plaintiff Allegany Wind, LLC, by its attorneys, Young/Sommer LLC, for its Complaint alleged as follows:

I. INTRODUCTION

1. Plaintiff Allegany Wind, LLC (the "Company") brings this action pursuant to Section 3001 of the Civil Practice Law and Rules ("CPLR"), seeking a declaratory judgment declaring the rights and obligations of the parties with respect to: (A) a Letter of Commitment, dated August 29, 2011, between the Company and Defendant Town of Allegany Town Board (the "Town Board"), (B) a related Host Community Agreement, dated August 29, 2011 (the "HCA"), and (C) an Escrow Agreement, dated December, 2011 (the "Escrow Agreement").¹

CATTARAUGUS COUNTY CLERK
2012 OCT -5 P 1:16

¹ The Letter of Commitment, Host Community Agreement, and the Escrow Agreement are collectively referred to as the "Agreements."

2. The Letter of Commitment and Escrow Agreement set forth the timing of the release from an escrow account of \$500,000.00 dollars (the "Escrow Payment") for a 72.5MW Allegany Wind Power Project ("Project") to be constructed in the Town of Allegany, Cattaraugus County, New York (the "Town"). There is a justiciable controversy between the parties regarding, *inter alia*, the interpretation of these agreements and the timing of the release of the funds in the escrow account.

3. The purpose of the Letter of Commitment, the HCA and the Escrow Agreement was to facilitate the construction of the Project in the Town of Allegany and to specify the host benefit payments that the Company would pay to the Town if and when the Project was constructed.

4. The Company deposited \$500,000.00 in escrow; the funds should not be paid to the Town until Project construction commences.

5. Litigation² challenging Project permits, and the actions of the Town Board and the Town Planning Board in approving the Project, postponed commencement of Project construction and deferred the terms of the Letter of Commitment, the HCA and the Escrow Agreement.

6. The Company and the Town Planning Board prevailed in the lawsuit, but the Project opponents filed an appeal. Recently, the appeal was dismissed by the Appellate Division, Fourth Department.

7. However, the Town Board (which due to recent elections now includes two avowed Project opponents) has taken steps to thwart Project development in contravention of their obligations under the Agreements with the Company. Included in these efforts, is the Town Board's

² A citizens group commenced an action-proceeding entitled *Concerned Citizens of Cattaraugus County v. Town Board of the Town of Allegany*, et. al., Index No. 79455 (the "CCCC litigation" or "litigation")

post litigation demand that the Company release the \$500,000.00 escrow amount or relinquish the permits. This demand was premature and contrary to the terms of the Agreement.

8. It was also contrary to the implied obligations of good faith and fair dealing imposed by law. The Town Board's demand did not afford the Company a reasonable time to update Project permits and re-secure Project funding commitments which, on account of the delay caused by the litigation and Town zoning initiatives, are now necessary for construction to proceed. The Town will not be harmed by providing the Company with the time needed to accomplish these tasks, which are aimed at constructing and operating the Project and making the concomitant Escrow/HCA payments to the Town.

9. The Town Board's ultimatum, and unreasonable deadline, are designed to kill the Project.

10. The Town Board has now incorrectly asserted that the Company's refusal to release the \$500,000 is a breach of the HCA and Escrow Agreement, and has initiated steps to revoke the Project's zoning approval.

11. The Company has complied with, and will continue to comply with, all the terms and conditions of the Agreements. The Company is taking reasonable steps to update its permits and secure essential funding commitments necessary for constructing and operating the Project.

12. The Company has not sought return of the escrow funds pending its good faith efforts to restore the Project to its pre-litigation status.

13. In this declaratory judgment action, the Company asks the Court: (A) to determine the parties' rights and obligations under the Agreements, and (B) to enjoin the Town from taking actions in violation of the Agreements.

14. The Company also brings this action to seek redress for the Town Board's recent efforts to kill the project through zoning amendments. These actions constitute breaches of the HCA, and are aimed at undermining the Project.

15. For the reasons set forth below, the Company is entitled to an order enjoining the Town Board from taking further actions aimed at interfering with, or undermining, the Project.

II. PARTIES

16. Plaintiff Allegany Wind, LLC (the "Company") is a limited liability company duly organized and existing under the laws of the State of New York and has its offices at 24 West 40th Street, 12th Floor, New York, New York.

17. Upon information and belief, the Town Board of the Town of Allegany, New York (the "Town Board") is a municipal corporation duly organized and existing under the laws of the State of New York and has its offices at Town of Allegany Town Hall, 52 West Main Street, Allegany, New York.

III. JURISDICTION AND VENUE

18. The Court has jurisdiction over the Defendant pursuant to CPLR §301, as Defendant is a New York municipality located in Cattaraugus County.

19. Venue in Cattaraugus County is proper because the Town is located in Cattaraugus County, and the Agreements provide that the venue for any litigation "shall be solely in the New York State Supreme Court for Cattaraugus County".

IV. BACKGROUND

A. TOWN PERMITTING, APPROVALS, AND PRIOR LITIGATION

20. This action arises out of the Company's plan to develop a 29 turbine wind energy generating facility in the Town of Allegany (the "Project").

21. The Project was previously the subject of litigation in this Court, entitled *Concerned Citizens of Cattaraugus County v. Town Board of the Town of Allegany*, et. al., Index No. 79455 (Hon. Michael L. Nenno, presiding) (the "CCCC litigation" or "litigation").

22. The CCCC litigation culminated in an Order and Judgment dated November 15, 2011, upholding the actions of: (A) the Town of Allegany Planning Board ("Planning Board"), and (B) the Town Board. The Court dismissed the CCCC Petitioners' claims in their entirety. Petitioners appealed, and the Appellate Division, Fourth Department issued an Order, dated September 6, 2012 dismissing the appeal.

23. The Planning Board issued approvals and permits for the Project in July 2011 after a three (3) year environmental and permit review process. The Planning Board determined that the Project would be compatible with the Town and would avoid or minimize potential environmental impacts from the Project to the maximum extent practicable.

24. The Planning Board's thorough environmental review process included a multi-volume Draft Environmental Impact Statement ("DEIS"), multiple public hearings and opportunities for public comment throughout the Project review, the preparation and completion of a Final Environmental Impact Statement ("FEIS"), which contained responses to the comments and

technical reports, and, ultimately, the issuance of the Planning Board's Statement of SEQRA Findings and Decision on July 11, 2011.

25. The SEQRA review process, engineering and environmental investigation cost the Company more than three million dollars (\$3,000,000.00). As part of this cost, the Company reimbursed the Town for its environmental consultant's fees and attorneys' fees over \$654,000.00.

26. Based on the conclusions in the Statement of Findings, the Planning Board issued a Special Use Permit and Site Plan approval for the Project on July 11, 2011. The Planning Board's Special Use Permit and Site Plan approval provide that the permits are "contingent upon and shall not be effective until approval by the Town Board of a Wind Energy Overlay District for the project."

27. The Town Board agreed to amend its Zoning Ordinance to create a Wind Energy Overlay District for the Project site. However, the Town Board made clear that it was not willing to adopt such an amendment unless and until the Company entered into a Host Community Agreement with the Town.

28. Such agreements are common for wind powered electric generating projects, and, dependent on the circumstances, can address a variety of issues.

29. During the HCA negotiations, the Town made clear that if and when the Project was constructed and operational, the Company must agree to provide additional economic benefits to the Town beyond payment in lieu of tax ("PILOT") payments negotiated with the Industrial Development Agency.

30. The Town Board and the Company agreed to terms which were incorporated in the Agreements. The Agreements were approved by the Town Board on August 29, 2011 and consisted of the HCA, Letter of Commitment, and the Escrow Agreement.

31. On August 29, 2011, the Town Board issued a SEQRA Findings Statement and adopted a Wind Energy Overlay District for the Project.

32. Similar to the conclusions of the Planning Board, the resolutions adopted by the Town Board in August, 2011 recognized that the Project: (A) is consistent with Town's planning objectives, (B) is compatible with the Town, and (C) would avoid or minimize potential adverse environmental impacts from the Project to the maximum extent practicable.

B. THE AGREEMENTS

33. A true and correct copy of the HCA is attached as **Exhibit A**.

34. A true and correct copy of the Letter of Commitment is attached as **Exhibit B**.

35. A true and correct copy of the Escrow Agreement is attached as **Exhibit C**.

36. The Agreements were negotiated between the parties in the context of the Planning Board and Town Board approvals. Consistent with these approvals and the aims of the HCA, the payment obligations under the Agreements were designed to be made in regard to an *operational* Project.

37. The parties negotiated and agreed to a two part package. The first part was the HCA. This agreement established annual payments, which would be payable on a "nameplate" capacity (MW) basis.³ As such, the HCA payments were calculated on the actual number of turbines installed for the Project, as each turbine has a stated "nameplate," MW capacity.

³ The term "nameplate capacity" means the maximum rated output of an operating wind turbine and is often stated

38. The Company's obligation to make payments under the HCA was: (A) limited to its interest in the Project, and (B) payable solely from revenues derived from the *operation*, lease sale or other disposition of the Project. (HCA Article XVI, Section 16.5).

39. Under full build out of the 29 turbine, 72.5 MW Project, the annual combined PILOT and HCA payments to the Town would be approximately \$350,000.

40. The second part of the Agreements was the Company's Letter of Commitment and the Escrow Agreement. In addition to the HCA payments, the Town insisted that the Company should make an additional Host payment in advance of Project operation (which was the trigger for the annual payment under the HCA). The Town insisted that the Company should make a payment of \$500,000 prior to commencement of construction.

41. The Company agreed to these terms and submitted a Letter of Commitment to the Town memorializing the agreement. Because the parties did not contemplate the immediate delivery of the funds to the Town, the parties also agreed that an escrow account should be established for the deposit of the advance payment funds.

42. Both the Letter Commitment and a draft of the Escrow Agreement were included as part of the Agreements, which, together with the Wind Overlay district law, were unanimously approved by the Town Board on August 29, 2011.

C. THE CCCC LITIGATION AND ITS AFFECT ON
THE PROJECT AND AGREEMENTS

43. Subsequent to the Town Board's action on August 29, 2011, CCCC commenced a lawsuit on October 4, 2011, which challenged: (A) the Planning Board's SEQRA Findings, Special

on a name plate affixed to the turbines.

Use Permit and Site Plan Approval, and (B) the Town Board's approval of the Wind Overlay District.

44. Justice Nenno dismissed the claims by Order and Judgment dated November 15, 2011.

45. CCCC appealed the Order and Judgment on November 23, 2011.

46. Approximately one year later, the Appellate Division, Fourth Department issued an Order, dated September 6, 2012 dismissing the appeal.

47. The practical effect of the litigation was to delay commencement of Project development until the claims were finally resolved.

48. Once the lawsuit was filed, delay was inevitable because of the difficulties of obtaining Project financing for a Project subject to pending litigation.

49. The risks of proceeding with construction without knowing that the Project permits and approvals would be upheld by the courts also necessitated that construction be delayed.

50. These realities were understood by the parties to the Agreements. No party has insisted that the Company should proceed with development while the CCCC litigation was pending.

51. The practical effect of the litigation was to toll permit/approval timeframes and related contract obligations.

52. The Agreements were premised on the construction/operation of the Project. Consequently, the commitments set forth in the Agreements were deferred pending: (A) resolution of the lawsuit, and (B) the subsequent construction or operation of the Project.

53. As a result of the litigation, an important funding commitment for the Project lapsed on November 29, 2011. One aspect of the funding for the Project was provided through the New

York State Energy Research and Development Authority (NYSERDA) as part of the New York State Renewable Portfolio Standard program.

54. The Company will seek renewal of this funding commitment when the next solicitation is released (expected by the end of 2012).

55. On the assumption that it had obtained all the necessary, discretionary approvals from the Town and would be in a position to proceed with Project development if and when the litigation was favorably resolved, and as a demonstration of good faith and the Company's commitment to the Project, the Company agreed to finalize and fund the Escrow Agreement while litigation was pending.

56. The Escrow Agreement as initially approved by the Board on August 29, 2011 is annexed as **Exhibit D**. The Escrow Agreement was amended on December 7, 2011 (**Exhibit C**) and ratified by the Town Board on December 29, 2011.

57. The Escrow Agreement was funded on December 7, 2011.

58. Among other things, the Escrow Agreement provided that while litigation was pending, unless the Company proceeded with construction, the \$500,000 advance payment to the Town would remain in escrow.

59. Despite being unable to move forward with construction during the winter of 2011-12, and with the CCCC appeal still pending, the Company was still working to ensure it could develop the Project in the future.

D. CHANGES ON THE TOWN BOARD

60. The political climate in the Town with respect to the Project became increasingly uncertain with changes in the Town Board membership that occurred in January, 2012.

61. By way of background, the Project was opposed by a small group of vocal residents known as Concerned Citizens of Cattaraugus County ("CCCC") who are opposed to wind development and the Project.

62. On November 8, 2011, the Town held elections for: (A) two positions on the Town Board, and (B) Town Supervisor. Two new Town Board members were elected, and a former Town Board member, John Hare, was elected Supervisor.

63. The two new Town Board members have publically opposed the Allegany Wind Project.

64. One of the newly elected Town Board members, Mr. David Koebelin, had previously spoken at public meetings opposing the Project.

65. Mr. Koebelin often joined with representatives from CCCC in advocating against the Planning Board's approval of the Project and against the Town Board's adoption of a Wind Energy Overlay District.

66. Mr. Koebelin has made clear that his objection to the Project is premised on his personal interests.

67. Upon information and belief, Mr. Koebelin purchased the site of his new home from a landowner who was also leasing nearby property to the Company for the wind project. Upon information and belief, the individuals who sold the home to Mr. Koebelin did not disclose the potential wind farm construction on the neighboring parcel prior to the sale.

68. If the Project is constructed, it will be visible from Mr. Koebelin's house, and Mr. Koebelin has stated that he is concerned that the Project's impact on his view will cause a reduction in his property value.

69. Despite this conflict, Mr. Koebelin has refused to recuse himself from participation in Town Board meetings pertaining to the Project.

70. Upon information and belief, Mr. Koebelin has become an influential member of the Board, and has shaped Town Board policy regarding the Project.

71. Upon information and belief, the other newly elected Town Board member, Mr. David O'Dell, is a member of the CCCC group that opposed the Project.

72. Upon information and belief, Mr. O'Dell is a member of the group that sued the Town and the Company, claiming the Company's approvals violated the law.

73. There is no evidence in the public record that Mr. O'Dell has resigned from CCCC.

74. Despite this conflict, Mr. O'Dell has continued to participate in the Town Board dealings with the Company and Wind Farm related matters—even while CCCC's lawsuit remained pending in the courts.

75. Mr. O'Dell has refused to recuse himself from participation on Town Board matters pertaining to the Project.

E. THE NEW TOWN BOARD'S EFFORTS TO UNDERMINE/BLOCK THE PROJECT

76. On or about January 1, 2012, the newly elected Town Board members who opposed the Project began their terms. Thereafter, the Board's posture toward wind development in general, and the Project in particular, deteriorated.

77. Since assuming office, the new Town Board has taken a series of steps that appear to be designed: (A) to undermine the Company's ability to proceed with the Project, and (B) to block

the Project altogether. All these actions violate the terms and spirit of the Agreements and are contrary to the implied obligation of good faith and fair dealing imposed by all contacts.

F. THE PROPOSED MORATORIUM

78. On February 14, 2012, the Town Board voted to consider a moratorium for wind projects in the Town. The proposed moratorium, entitled proposed Local Law No. 1 of 2012, if adopted would have prevented the Company from exercising its rights under the permits and approvals issued by the Planning Board.

79. The proposed local law was clearly aimed at thwarting the Project.

80. No other wind company has applied for a wind project approval in the Town since the Company's Project was approved.

81. On or about February 27, 2012, the Company submitted comments on proposed Local Law No. 1 of 2012. The Company reminded the Town of its obligations under the HCA, and underscored that adopting a moratorium would violate the terms and the spirit of the Agreements.

82. In meetings with Town Board members, Company representatives also made clear that given the pendency of the CCCC appeal, the Company had no plans to proceed with further applications or construction until the appeal was resolved.

83. At its meeting on March 27, 2012, the Board determined to "discontinue the moratorium process at this time." The Board members, however, acknowledged that they might revive the process at a later date.

84. While the Town Board was considering the moratorium, the Company did not proceed with planning activity, supplemental applications or development regarding the Project.

85. The Board's consideration of amendments to the Town's Wind Law⁴ had a chilling effect on the Company's activities.

86. Subsequent to the March meeting, the Board continued to consider a variety of options and suggestions regarding modifications to the Town's Wind Law. If adopted, some of the proposed modifications would have required radical changes to, or would effectively kill, the Project.

87. The delay caused by the CCCC litigation and the uncertainty created by the Town Board's reconsideration of the Wind Law in early 2012, precluded the Company from commencing construction of the Project.

88. By letter, dated June 5, 2012, the Company applied to the Planning Board for a one (1) year extension on the approvals. Consistent with its decision, not to proceed with plans or development of the Project while the Town Board reconsidered the Wind Law, the Company informed the Planning Board that it was not proposing Project modifications as part of the extension application.

89. On June 13, 2012, the Planning Board granted a short-term extension of the Permits.

G. AMENDMENT TO THE WIND LAW

90. At its meeting on July 17, 2012, the Town Board proposed a new Local Law No. 1[sic]⁵ of 2012. The proposed law limits the height of wind turbines to 497 feet.

91. The height limit is 5 feet taller than the currently approved turbines for the Project.

⁴ On August 25, 2007, the Town amended the Town Zoning Ordinance to regulate wind projects, which was last entitled "Wind Energy Regulations." These regulations were subsequently amended on February 24, 2011.

⁵ This was the second proposed local law of 2012; the moratorium law was the first.

92. On August 21, 2012, the Town Board voted to approve Local Law No. 1, imposing a 497 ft. height limitation on all turbines constructed in the Town.

93. The new law limits turbine modification options available to the Company. Turbine modifications were expressly envisaged in the Agreements and Project approvals.

94. Modifications of this nature are designed to make a project more efficient, using the latest technologies in turbine design.

95. It is not clear whether adoption of this Local Law was the culmination of the Town Board's reexamination of the Town's Wind Law or whether the Town Board plans additional modifications.

96. By letter, dated August 3, 2011, the Company notified the Town and the Town Planning Board of its proposal to substitute more efficient turbines at the Project site, which meet the Town's newly enacted height limit.

97. The Planning Board approvals and the Agreements allowed for substitution of turbines and related equipment, subject to Planning Board review.

98. The Planning Board's review of the substitution proposal is pending as of the date of this Complaint.

H. THE TOWN BOARD'S VIOLATIONS OF THE AGREEMENTS REGARDING CONDUCT OF THE CCCC LITIGATION AND THE ESCROW AGREEMENT

99. Upon information and belief, in a further effort to undermine the Project, the Town Board, through its attorneys, cooperated with the attorneys for CCCC in discussions, which appear to

be designed to convince CCCC to terminate its appeal in the CCCC litigation. The Company did not authorize this contact or plan.

100. This cooperative effort was a clear violation of the terms of the HCA agreement. The HCA gave the Company the right to control the defense and settlement of all claims. The HCA provides:

The Company will have the right to control the defense of any such actions or claims and will have the right to settle such actions or claims on such terms as it may deem reasonable so long as such defense and/or settlement are approved by the Town and releases or indemnifies the Town.

HCA Section 13.2(c).

101. The Town Board's aim in this cooperative effort with the project opponents was not altruistic. Instead, the correspondence and coordinated effort appears to be designed to create leverage, and compel the premature release of \$500,000 in escrowed funds. The Town Board's actions, in concert with Project opponents, are designed to force the Company to relinquish its permits (thereby terminating the Project).

102. The Town Board's actions are contrary to its obligation to act in good faith, and are contrary to the terms, conditions and understandings set forth in the Agreements.

103. Unaware of the arrangements being worked out between the Town Board and the CCCC Project opponents, on July 31, 2012, Company representatives met with Town representatives in order to address concerns about Escrow Payments that some Board members were claiming would become due once the CCCC litigation was resolved.

104. As discussed in more detail below, the Town's interpretation of the Agreements was not supported by the terms of the documents.

105. At the July 31, 2012 meeting, representatives of the Town Board also expressed opinions regarding “damages” that the Town had incurred as a result of the CCCC litigation, and the postponement of the preconstruction escrow payment, which were unfounded.

106. Nevertheless, in an effort to resolve any concerns the Board might have, the Company offered to clarify the terms of the Escrow payment commitment, and make an additional \$25,000 payment. The Company’s willingness to offer the payment was made despite the fact that there was no basis for the Board’s position. These offers were confirmed in the Company’s letter, dated August 3, 2012 and were reconfirmed at subsequent meetings and in subsequent correspondence.

107. At the July 31, 2012 meeting, the Company also advised the Town Board of its plans to substitute turbines at the Project.

108. At the July 31, 2012 meeting, Special Counsel for the Town advised Company representatives that CCCC might seek to withdraw its appeal. At that time, the appeal had been dormant for approximately 8 months. By virtue of the Rules of the Appellate Division, Fourth Department, the appeal would be dismissed for lack of prosecution after 9 months if the CCCC failed to perfect the appeal.

109. At the July 31, 2012 meeting, and in subsequent meetings and correspondence, it became clear that the CCCC representatives were collaborating with members of the Town Board, or their attorneys to accelerate dismissal of the appeal. Subsequent communications revealed the Town Board’s motives in coordinating with the Town’s adversary in the lawsuit.

110. Without taking into account the history and terms of the Agreements as a whole, the Town Board mistakenly interpreted the terms of the Escrow Agreement to require the Company to order the release of the \$500,000 escrow funds or relinquish its permits, within 10 days of the

termination of the CCCC appeal, regardless of whether the Company had the necessary permits, funding or commitments to proceed with the Project.

111. Under this misguided theory, the cooperative effort by the Town and CCCC to end the appeal (even if only a month earlier than it would have been dismissed as a matter of course) was aimed at forcing the Company to relinquish its permits. The more accelerated the payment time frame, the less likely it would be that the Company could obtain the updated permits, funding or commitments to build the Project. Without assurances and funding that Project that could actually be constructed, the Company could not justify the advance payment of \$500,000.00.

112. As predicted by the Town's Special Counsel, on August 7, 2012 at 12:42 pm, counsel for CCCC e-mailed a proposed stipulation of discontinuance to counsel for the Town and the Company for signature.

113. Twenty-six minutes later, at 1:08 pm, Special Counsel for the Town emailed the Stipulation bearing Special Counsel's signature to counsel for all the parties.

114. Because the HCA granted the Company exclusive control of the defense of the CCCC litigation, the Company objected to the Town's precipitous actions. Counsel for the Town had not consulted with, or obtained the approval of, the Company prior to executing the stipulation.

115. The Company's counsel reserved its rights to review the Stipulation, and expressed concern that the proposed stipulation prepared by CCCC's counsel was not an appropriate means of discontinuing the Appeal.

116. Two days later, on August 9, 2012, the Town's Special Counsel filed its own motion to dismiss the Appeal. The coordinated actions by CCCC and the Town were aimed at undermining the Company's Agreements with the Town by forcing the Company to forfeit its permits.

Accordingly, on August 9, 2012, the Company advised the Town's Special Counsel that the motion, which was made without the Company's consent, was a breach of the HCA and demanded that the motion be withdrawn. Special Counsel for the Town thereafter withdrew the motion on August 15, 2012.

117. The next day, on August 16, 2012, CCCC filed a motion to dismiss the appeal. The motion was aimed at forcing the Company to relinquish its permits. Since the appeal was scheduled to be "deemed abandoned" for failure to prosecute in less than 30 days, the message was clear. The timing of the August 16, 2012 motion by CCCC was designed to demonstrate the allegiance between CCCC and the new Town Board.

118. By Order dated September 6, 2012, the Appellate Division, Fourth Department dismissed CCCC's motion "on the ground that the appeal is deemed abandoned and dismissed."

I. THE TOWN DEMANDS PAYMENT

119. Incorrectly interpreting the September 6, 2012 dismissal as a triggering event under the Escrow Agreement, the Town Board demanded that the Company release the \$500,000 escrow fund or relinquish its permits by September 20, 2012.

120. The Company disputed this interpretation of the Agreements.

121. The Town Board by letter dated September 25, 2012 from its Special Counsel has asserted that the Company's failure to make an election was a breach of the HCA and the Escrow Agreement.

J. TOWN PROPOSES ZONING AMENDMENT
TO ELIMINATE WIND OVERLAY DISTRICT

122. On September 25, 2012, after sending the letter asserting a breach, the Town Board initiated a Zoning amendment process aimed at eliminating the Wind Energy Overlay District.

123. At its September 25, 2012 meeting, the Town Board introduced "Local Law No. __ of 2012, A Local Law Amending the Town Zoning Map to Remove the Wind Energy Overlay District." The Town announced it was scheduling a public hearing on the local law on October 10, 2012.

124. Upon information and belief, the Town referred the local law to the Town Planning Board and the County Planning Board for their comments on the proposed local law.

125. The Planning Board has listed consideration of the proposed local law on the agenda for its October 15, 2012 meeting.

126. Upon information and belief, the Town Board did not vote on or issue any resolutions authorizing the referral to the Planning Board.

127. Such an amendment to the Town's zoning law would effectively "zone the Project out." If adopted, such an amendment would render Project permits inoperative. As such this action would breach the terms of the HCA.

128. The Town Board has rejected all requests by the Company to reach agreement regarding the appropriate construction of the terms of the Escrow Agreement. The Town's interpretation is contrary to the "meeting of the minds" of the parties and current circumstances.

K. THE TOWN BOARD HAS MISINTERPRETED
AND IS MISAPPLYING THE ESCROW
AGREEMENT

129. The Town Board has misconstrued and misapplied the Escrow Agreement for a variety of reasons.

130. First, the payment requirements of the Escrow Agreement must be considered *in pari materia* with the other documents approved by the Town Board as part of the Agreements and the circumstances of the parties at the time of such approval. The Agreements defer Project/escrow decision making until all permits and funding are in place.

131. The terms of the agreement requiring release of the funds, or abandonment of the Project, have not been triggered.

132. Contrary to the Town's assertion, the Escrow Agreement does not contain a "time is of the essence" provision for release of the Escrow funds.

133. Finally, the Town Board is seeking to enforce a provision of the Escrow Agreement that does not apply under the current status of the Project.

134. None of the Agreements was intended to create a gift for the Town, payable whether or not the Project was constructed.

135. At the time that the Agreements were approved by the Town Board, the parties understood that the Company had permits and funding from NYSERDA, and would soon be in a position to move forward with Project development. In this context, the HCA established an annual payment schedule, funded by Project revenues, which was to commence upon completion of construction and operation of the Project.

136. The \$500,000 advance payment was to be made when Project construction commenced. In fact, the Escrow Agreement provides that the payment is triggered when the Company commences excavation for any Turbine Foundation. [Escrow Agreement, Section 2[b][1]]. The purpose of the Escrow Agreement was to assure that the advance payment funds would be available at the commencement of construction. The escrow was designed to assure that the funds could not be removed prematurely.

137. That the parties intended that payments should be made only for a Project that would be built is clear from the stated Conditions for Release set forth in the Escrow Agreement. Section 2(b)(i) of the Escrow Agreement defers any payments out of the escrow account until: (1) after all permits, approvals and funding for the Project are in place, and (2) the Statute of Limitations for challenging such permits, approvals and funding had run.

138. Under this provision, the Town's demand that the Company release escrow funds, or relinquish its permits, is clearly premature. Among other things, the provision defers any escrow decision date until the statute of limitations has run, or litigation has been resolved, regarding "the payment in lieu of tax agreement entered into *or to be entered into* between the Company and the Cattaraugus County Industrial Development Agency." (Escrow Agreement Section 2[b][i][dd] (italics added)). The PILOT has not been finalized and executed.

139. Nor has the Statute of Limitations run with respect to the PILOT Agreement.

140. The Town's interpretation of the Escrow Agreement overlooks the over-arching provision in the Agreement, which best reflects the intent of the parties: Section 2(b). That section creates flexibility for escrow payment release dates. It provides that the Funds shall be released no

earlier than thirty (30) days after the Deposit Date (the “Escrow Period”), upon the satisfaction or waiver of the following conditions....” (Emphasis supplied).

141. Consistent with this provision, none of the dates in the Escrow Agreement are “time of the essence” requirements.

142. Moreover, execution and funding of the Agreement itself was deferred for more than three (3) months. (Id.). Consequently these dates should be construed as having considerable flexibility, in order to give effect to the intent of the parties.

143. In this case, the “meeting of the minds” was that after all approvals/funding were obtained, and the applicable Statute of Limitations had run, prior to construction the Company would either: (A) determine to “discontinue development and construction of the Project” (Escrow Agreement, Section 2[c][ii]) and have the funds returned, or (B) proceed with construction and release the funds to the Town. Neither of these conditions have occurred.

144. In demanding that the Company relinquish its permits, or release the escrow funds, the Town Board relies on a provision of the Escrow Agreement, Section 2[c][1], that does not apply to the current circumstances.

145. Section 2[c] of the Escrow Agreement addresses options for the Company *during* litigation.

146. The Company has not sought return of the escrow funds pending the CCCC litigation. Consistent with the basis of its bargain with the Town Board, the Company has left the funds in the escrow account pending receipt of all necessary approvals and funding as contemplated in the Agreements.

147. Once these approvals and funding are in place and the applicable Statutes of Limitations have run, the Company will exercise its option (the "Election") under Escrow Agreement in accordance with Section 2(b) and (c)(ii) by either: (A) releasing the funds to the Town and commencing construction, or (B) "declar[ing] its intention to discontinue development and construction of the Project" and requesting the return of the escrow funds.

**AS AND FOR THE FIRST CAUSE OF ACTION
(DECLARATORY JUDGMENT)**

148. Plaintiff repeats and realleges each and every allegation in paragraphs 1 through 147 of the Complaint, as if fully set forth herein.

149. Pursuant to CPLR §3001, the Court can issue judgment declaring the rights and obligations of parties with respect to the Agreements.

150. There is a justiciable controversy concerning: (A) the parties' rights and obligations under the Agreements, and (B) the Company's obligation to release the escrow funds or relinquish its permits.

151. The Company contends that any deadline for the Company to make an election under the Escrow Agreement has not started to run.

152. The PILOT agreement with the Cattaraugus County IDA (Escrow Agreement Section 2[b][1][dd]) has not been executed and delivered. The PILOT Agreement is part of the funding arrangement for the Project.

153. The Company's time in which to make an election either: (A) to release funds or (2) relinquish its permits has not been triggered.

154. The Company has a reasonable amount of time to undertake good faith efforts to update permits and secure financing.

155. By reason of the foregoing, the Company is entitled to a declaratory judgment, pursuant to CPLR §3001, granting the relief set forth in the “Wherefore” clause of this Complaint.

**AS AND FOR A SECOND CAUSE OF ACTION
BREACH OF CONTRACT (INJUNCTIVE RELIEF)**

156. Plaintiff repeats and realleges each and every allegation in paragraphs 1 through 155 of the Complaint, as if fully set forth herein.

157. The Town Board’s actions regarding the CCCC litigation breached the terms of the HCA, which vested exclusive control over litigation decisions with the Company.

158. The Town Board’s actions were inconsistent with its duty to defer decision-making to the Company, and were aimed at undermining the Project.

159. The Town Board’s statement that the Company was in breach of the Agreements was aimed at discrediting the Company with the public, and with the boards and agencies considering the Company’s applications to update its permits and secure Project financing and a PILOT Agreement.

160. The Town Board’s Notice of Breach of the Host Community Agreement and Escrow Agreement, dated September 25, 2012, and proceedings to revoke the Zoning approvals for the Project constitute an anticipatory breach and a repudiation of the HCA and the Escrow Agreement.

161. The Company has vested rights in the Project.

162. The Town Board actions threaten to cause the Company irreparable harm.

163. The Town Board’s actions are unreasonable and are aimed at terminating the Project rather than protecting contract rights.

164. Article XVI, Section 16.3 of the HCA provides:

The parties acknowledge that neither party has an adequate remedy by way of damages in the event that the other party materially breaches or threatens to materially breach the obligations and restrictions contained within this Agreement, and therefore each party agrees that, in the event of a breach of this Agreement the aggrieved party may apply to a court of competent jurisdiction for equitable relief directing the other part to comply with this Agreement and/or enjoining or restraining the other party from any material breach hereof.

165. The Company has not made any other request for the relief requested in this Complaint to any other court.

166. If not enjoined, the Town Board's actions will cause irreparable harm.

167. The Town Board's breaches will hinder the Company's ability to update its permits and secure financing to proceed with the Project.

168. By reason of the foregoing, the Company is entitled to the relief requested in the "Wherefore" clause of this Complaint.

**AS AND FOR A THIRD CAUSE OF ACTION
CONFLICT OF INTEREST OF TOWN BOARD MEMBERS
DAVID KOEBLIN AND DAVID O'DELL (INJUNCTIVE RELIEF)**

169. Plaintiff repeats and realleges each and every allegation in paragraphs 1 through 168 of the Complaint, as if fully set forth herein.

170. Town Board member David Koeblin opposes the Project based on his stated personal and financial conflict of interests.

171. Such conflict of interest has compromised Mr. Koeblin's ability to make impartial judgments, solely in the public interest regarding the Project.

172. Mr. Koebelin's conflict of interest creates an appearance of impropriety, partiality and bias.

173. Accordingly, Mr. Koebelin's conflict of interest disqualifies him from participating in any discussions or taking any actions as a Town Board member regarding the Project.

174. Upon information and belief, Town Board member David O'Dell is a member in CCCC, which has steadfastly opposed the Project and Town approvals and instituted litigation to overturn such approvals.

175. Participation in CCCC in opposing the Project and Town approvals is a conflict of interest that has compromised Mr. O'Dell's ability to make impartial judgments solely in the public interest regarding the Project.

176. Mr. O'Dell's conflict of interest creates an appearance of impropriety, partiality and bias.

177. Accordingly, Mr. O'Dell's conflict of interest disqualifies him from participating in any discussions or taking any action as a Town Board member regarding the Project.

178. If not enjoined, Mr. Koebelin's and Mr. O'Dell's continuing participation and actions as Town Board members regarding the Project will cause irreparable harm.

179. By reason of the foregoing, the Company is entitled to an order disqualifying Mr. Koebelin and Mr. O'Dell and enjoining them from participating in any discussions or taking any actions as Town Board members regarding the Project.

WHEREFORE, Plaintiff demands judgment against the Defendant as follows:

- (A) Under the first cause of action, granting Plaintiff a declaratory judgment declaring that:

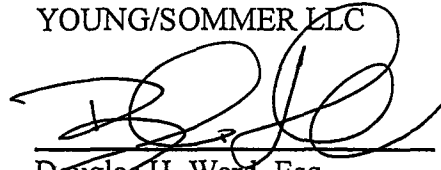
- (i) The deadline for triggering the Company's obligation to make an Election under Sections 2(b)(i) and (c)(ii) of the Escrow Agreement has not accrued;
 - (ii) Until all Project approvals, permits, and funding commitments, including, but not limited to, execution and delivery of the PILOT Agreement, and the expiration of all relevant limitations periods, the Company has no obligation to make an Election under the Agreements;
 - (iii) Unless the Company voluntarily relinquishes its permits under the Escrow Agreement, the Company has vested rights in the Project;
 - (iv) Any deadline or expiration period for any permit or approval was tolled during the time the CCCC litigation was pending, including appeals, and the permits and approvals are extended for a period equal to the tolling period;
 - (v) The deadlines in the Escrow Agreement are not time of the essence provisions; and
 - (vi) The Town Board's September 25, 2012 purported "Notice of Breach" letter is a nullity;
- (B) Under the second cause of action, declaring the Town Board in breach of the Agreements and preliminarily and permanently enjoining the Town Board from:

- (i) Taking any action inconsistent with the Town's obligation to fulfill the terms of the Agreements;
 - (ii) Enacting any law that would prohibit the construction or operation of the Project;
 - (iii) Taking any action designed to interfere with or frustrate the Company's rights under the permits and Agreements; and
 - (iv) Interfering with the Company's application for Project modifications, which is pending with the Planning Board;
- (C) Under the third cause of action, declaring that Town Board members David Koeblin and David O'Dell are disqualified regarding the Project and preliminarily and permanently enjoining them from:
- (i) Participating as Town Board members in any discussions regarding the Project;
 - (ii) Taking any actions as Town Board members regarding the Project;
 - (iii) Being seated with the Town Board during any discussions or action regarding the Project.
- (D) Granting fees, costs and expenses of this action; and
- (E) Granting other and further relief, including injunctive relief, as this Court deems just and proper.

DATED: October 4, 2012
Albany, New York

YOUNG/SOMMER LLC

By:




Douglas H. Ward, Esq.
James A. Muscato II, Esq.
Attorneys for Respondent
Allegany Wind, LLC
Executive Woods
Five Palisades Drive
Albany, New York 12205
(518) 438-9907
(518) 438-9914 (Fax)

VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

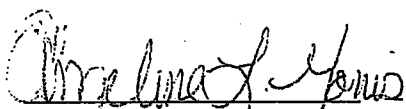
Douglas H. Ward, being duly sworn, deposes and says:

I am a member of the firm of Young, Sommer, Ward, Ritzenberg, Baker & Moore LLC, attorneys for Plaintiff Allegany Wind LLC in this action; that I have read the attached Verified Complaint, know the contents thereof, and that the same are true to the best of my knowledge, except those matters stated to be alleged upon information and belief, and as to those matters, I believe them to be true; that the grounds and sources of my belief are written documents and reports in my file of this matter, interviews with past and present employees of the Plaintiff Allegany Wind LLC, as well as my investigation of this matter. I make this verification because Plaintiff does not reside in or maintain an office in the county where your deponent's office is located.



Douglas H. Ward

Sworn to before me this
4th day of October, 2012



Notary Public

Angeline L. Morris
Notary Public, State of New York
Qualified in Erie County
Certificate Filed in Schenectady County
My Commission Expires 9/21/14